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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 547

NEW COLONIAL ICE CO., INC.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

EDWARD G. GRIFFIN,
Attorney for Petitioner.

JOSEPH STERLING, ESQ.,
of Counsel.

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IN THE

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OCTOBER TERM, 1933.

NEW COLONIAL ICE CO., INC.,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed petition of the New Colonial Ice Co., Inc., by Willis B. Kirkpatrick, its President, duly verified the 23rd day of October, 1933, a certified copy of the entire transcript of the record of this proceeding including the proceedings in the Circuit Court of Appeals for the Second Circuit submitted herewith, and the petitioner's brief, also hereto annexed, an application will be made to the Supreme Court of the United States at a Term of said Court appointed to be held at the Capitol, Washington, D. C., on the day of October, 1933, at the opening of Court on that day or as soon thereafter as counsel can be heard for a Writ of Certiorari to be directed to the Circuit Court of Appeals for the Second Circuit, to review the final judgment of the Circuit Court of Appeals for the Second Circuit, entered on the 24th day of July, 1933, which affirmed a judgment of the United States Board of Tax Appeals entered herein on the 8th day of January, 1932.

Dated, October 19th, 1933.

EDWARD G. GRIFFIN,
Attorney for Petitioner,
51 Madison Avenue,
New York City.

JOSEPH STERLING, ESQ.,
of Counsel.

To:

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

NEW COLONIAL ICE CO., INC.,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New Colonial Ice Co., Inc., by Willis B. Kirkpatrick, its President, respectfully shows to this Honorable Court as follows:

1. That it is a company duly organized under and by virtue of the laws of the State of New York.

2. The respondent determined a deficiency for the calendar years of 1922 and 1923 against the petitioner herein in the total sum of $5,681.13. Respondent duly sent to the petitioner by registered mail, a notice of its said deficiency. Thereafter, the petitioner filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. On November 24th, 1931, the Board of Tax Appeals promulgated its findings of

fact and opinion in this appeal and on January 8th, 1932, the Board entered its judgment and final order of redetermination wherein and whereby the Board ordered and decided the amount of deficiencies for the period from April 14th, 1922, to December 31, 1922, at $6,095.43, and for the calendar year of 1923 at $828.07.

3. Petitioner herein and the respondent submitted the issues to the United States Board of Tax Appeals on a stipulated and agreed statement of facts (Rec., fols. 49 to 87). As appears from said stipulated facts, the petitioner was incorporated pursuant to a scheme of reorganization embodied in a written agreement between a predecessor corporation, known as the Colonial Ice Corporation, hereinafter referred to as the "old company" and the creditors of said Colonial Ice Corporation, whereby the petitioner took over the assets and assumed the liabilities of the "old company" and creditors agreed to complete the plant of the "old company", and the stock of the new company was issued in a manner more specifically set forth in said stipulation of facts. The "old company" had substantial losses in the year 1921 and from January 1st to April 13th, 1922.

4. The sole issue involved in this proceeding before the Board of Tax Appeals, was whether the petitioner should have the benefit of the net losses sustained by the "old company" for the calendar year of 1921 and the period of January 1, 1922, to April 13th, 1922. It was the petitioner's contention that whether the petitioner and the "old company" were to be regarded as affiliated under Section 240-c of Revenue Act of 1921, C. 136, 42 Stat. 227, or identical under Section 202-c and 204 of the same Act, the petitioner should receive the benefit of the "old company's" net losses in determining consolidated net income for the period of April 13th, 1922, to December 31, 1922. It was also the peti-

tioner's contention that the separate legal entities of the "old company" and the petitioner should be disregarded, and the petitioner considered as if it were the taxpayer which sustained the prior year's losses. The Board of Tax Appeals held that the separate legal entities should not be disregarded. It found a deficiency against the petitioner and entered its final order redetermining the tax against the petitioner herein.

5. Thereafter, the petitioner appealed to the Circuit Court of Appeals, from the determination of the Board of Tax Appeals, and said appeal came on to be heard before said Court. Thereafter, and on the 24th day of July, 1933, the Circuit Court of Appeals for the Second Circuit entered its mandate affirming the determination of the Board of Tax Appeals.

6. Your petitioner submits that in this case there is no disputed questions of fact. A grave question of law presents itself and one on which there is a irreconcilable conflict between the views of the Circuit Court of Appeals, 6th Circuit and the views of the Circuit Court of Appeals for the 2nd Circuit. The question stated compactly, is this: Where a successor corporation has the same assets and liabilities, with the same stockholders beneficially interested in the same proportions, and with the same classes of stock as its predecessor corporation, and where the succeeding corporation is organized in the same state and with the same corporate purposes as its predecessor, and in all respects, in fact, if not in form, is the same corporation as its predecessor, may the courts overlook the form and deal with the substance to the end that the successor corporation shall be entitled to charge against the profits of one year the losses sustained by the predecessor corporation in the preceding year? To this question, the 6th Circuit has answered in the affirmative, holding that the form shall

be ignored and the substance respected. (*Pioneer Pole & Shaft Co.* v. *Commr.*, 55 Fed. [2] 861; *H. H. Miller Industries* v. *Commr.*, 61 Fed. [2] 412.)

To the same question, the Second Circuit has answered in the negative, declining to follow the rule of the Sixth Circuit (Opinion, page 6).

The view taken by the Second Circuit is, that unless the petitioner is able to point to a specific statute allowing it to benefit by the net loss sustained by its predecessor company, it may not prevail. It refuses to recognize that the corporate fiction may in any case be ignored. On the other hand, the Sixth Circuit, in deciding the *Pioneer Pole* and *H. H. Miller Industries Co.* v. *Commissioner* cases, evidently followed the rule as stated in the Fourth Circuit in *Western Maryland Ry. Co.* v. *Commr.*, 33 Fed. (2) 695, 697 (C. C. A. 4th), in which the learned Court stated:

> "The rule just stated is of peculiar importance in tax cases; for, unless the Courts are very careful to regard substance and not form in matters of taxation, there is grave danger on the one hand that the provisions of the tax laws will be evaded through technicalities and on the other that they will work unreasonable and unnecessary hardship on the taxpayer. It is instructive to note the many tax cases decided in recent years in which the courts have not hesitated to ignore corporate forms, and to decide the questions involved in the light of what the parties have actually done, rather than on the basis of the forms in which they have clothed their transactions."

Your petitioner verily believes, that the learned counsel who represented the respondent herein, also recognized that there was an irreconcilable conflict between

the decision in the instant case and the *Pioneer Pole & Shaft Co.* and *H. H. Miller Industries Co.* v. *Commissioner* cases, *supra.*

Your petitioner submits that no case so far decided has the facts which so squarely raises the proposition of law involved, as the case at bar, and that public interest requires this conflict between the departments to be resolved by this Court.

7. Your petitioner presents herewith, as part of this petition, a brief showing more fully its views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Second Circuit, demanding that court to certify and to send to this Court for its review and determination a full and complete transcript of the record of all proceedings herein and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that the petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

Dated, New York, October 23rd, 1933.

NEW COLONIAL ICE CO., INC.,
By William B. Kirkpatrick
Petitioner.

Edward G. Griffin
Attorney for Petitioner,
51 Madison Avenue,
New York City.

United States of America,
State of New York,
City of New York,
County of New York, } ss.:

WILLIS B. KIRKPATRICK, being duly sworn, says that he is the President of the New Colonial Ice Co., Inc., the petitioner above named; that he has read the same and knows the contents thereof; and the facts therein stated are true to the best of his knowledge, information and belief.

Willis B. Kirkpatrick

Subscribed and sworn to before me,
this 23rd day of October, 1933.

MARGARET M. DONOVAN,
Notary Public,
Kings Co. Clk's No. 517, Reg. No. 5181,
N. Y. Co. Clk's No. 495, Reg. No. 5D308,
Bronx Co. Clk's No. 31, Reg. No. 95035,
Queens Co. Clk's No. 1832, Reg. No. 7043,
Commission expires March 30th, 1935.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

NEW COLONIAL ICE CO., INC.,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S POINTS ON APPLICATION FOR WRIT OF CERTIORARI.

Jurisdiction.

The order of the Circuit Court of Appeals affirming the determination of the Board of Tax Appeals was entered on July 24th, 1933. The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code as amended by the Act of February 13th, 1925.

POINT I.

The question in dispute between the Sixth and Fourth Circuits and the Second Circuit, is whether: Legal entities should be disregarded in favor of corporate taxpayers so as to permit a successor corporation to avail itself of the net losses of a prior year of its predecessor corporation where the successor corporation is in substance and effect identical with its predecessor?

H. H. Miller Industries Co. v. *Commr.*, 61 Fed. (2) 931 (C. C. A. 6th);

Pioneer Pole & Shaft Co. v. *Commr.*, 55 Fed. (2) 861 (C. C. A. 6th);
Weiss v. *Stearn*, 265 U. S. 242;
Marr v. *U. S.*, 269 U. S. 536;
Western Maryland Ry. Co. v. *Commr.*, 33 Fed. (2) 695 (C. C. A. 4th);
Industrial Cotton Mills v. *Commr.*, 61 Fed. (2) 291 (C. C. A. 4th);
Standard Silica Co. v. *Commr.*, 22 B. T. A. 97;
Commissioner of Internal Revenue v. *Sansome*, 60 Fed. (2) 931 (C. C. A. 2nd);
Revenue Act of 1921, C. 136, 42 Stat. 227, Secs. 202c, 204 and 240c.

We shall address ourselves to the question as to whether separate corporate identities will be ignored as well in cases when the corporation itself is the taxpayer, as in a case where a stockholder is the taxpayer, on whose behalf it has been urged, that for the purposes of the Act, the stock owner's holdings in the new company was substantially the same thing as his holdings in the old.

Both *Marr* v. *United States, supra,* and *Weiss* v. *Stearn, supra,* recognize that in the latter situation, the separate corporate entities will be treated as one. In the *Standard Silica* case, *supra,* the Board comments on *Weiss* v. *Stearn,* and *Marr* v. *United States.* After discussing these cases, the Board correctly states the principles for which these two cases stand, in the following language:

> "If the foregoing cases just discussed contain any controlling principles relative to the issue here presented, it would seem to be that where two or more corporations reorganize, the business and assets of which are not materially changed and the stockholders receive nothing actually severed from

> their original capital interest,—nothing differing in substance from what they already had, then in such a case the legal distinction in corporate entity should be ignored. See dissenting opinion, *Marr* v. *United States, supra.*"

In both *H. H. Miller Industries Co.* v. *Commr.* and *Pioneer Pole & Shaft Co.* v. *Commr., supra,* the taxpayer was the corporation which sought to invoke the doctrine that corporate fictions were to be ignored not only for the benefit of a stockholder, but for the benefit of the corporation itself. The 6th Circuit adopted this view. It extended the doctrine of *Weiss* v. *Steam, supra,* to the cases then before it.

The view of the 6th Circuit apparently is in harmony with that of the 4th Circuit (see *Western Maryland Ry. Co.* v. *Commr.* and *Industrial Cotton Mills* v. *Commr., supra*). Other cases before the Board of Tax Appeals and various circuits, although deciding adversely to the taxpayer, apparently recognize the rule. Opinions in these cases point out essential differences between the corporate entities, which distinctions are held to be matters of substance and not merely of form. *Standard Silica Co.* v. *Commr., supra,* and *Maytag Co.* v. *Commr.*, 17 B. T. A., 182, are examples.

In the instant case, the identity of New Colonial Ice Co., Inc., the taxpayer, with its predecessor corporation, Colonial Ice Corporation, is so complete that the case may not be disposed of by any real or fancied difference. Factually, there has been no interruption of corporate entity. There are no features in this case which would enable the Court to distinguish it from the *Pioneer Pole & Shaft Co.* v. *Commr.* and *H. H. Miller Industries Co.* v. *Commr.* cases, above discussed. The learned Second Circuit frankly recognizes this in the following language:

> "The petitioner is unable to point to any statute allowing it to benefit by the net loss sustained by the old company and therefore it may not prevail. *Woolford Realty Co.* v. *Rose, supra; Dalton* v. *Bowers, supra; Pioneer Pole & Shaft Co.* v. *Commr.* (55 Fed. [2] 861 [C. C. A. 6]) and *Miller & H. H. Industries Co.* v. *Commr.* (61 Fed. [2] 412 [C. C. A. 6]), are cases in which the court held that the petitioner there was the same taxpayer as its predecessor. If they may be regarded as in conflict with this decision, we are constrained not to follow these authorities. We hold the old and the new corporation to be separate taxpayers."

Counsel for the petitioner also apparently recognizes this to be so in the following language contained in respondent's brief below, counsel stating:

> "To the extent that *Pioneer Pole & Shaft Co.* v. *Commissioner,* and *H. H. Miller Industries Co.* v. *Commissioner, supra,* are in conflict with the position taken by the respondent, we believe those cases to have been incorrectly decided."

The opinion of the learned Court below, is predicated on the premise that a corporate taxpayer may never claim to be the same entity as another corporation. If it is incorrect in this, the reasoning in its opinion fails. If substance is to be considered rather than narrow, literal construction of the statute, we fall under Sections 202(c), 204 and 240(c) of the Revenue Act of 1921, C. 136, 42 Stat. 227. Cases where the Court, at the Government's request, have ignored separate corporate entities and treated two corporations as one, are, *Palmolive Co.* v. *Conway,* 46 Fed. (2) 226; *U. S.* v. *Barwin Realty Co.,* 25 Fed. (2) 1003.

Cases (other than income tax cases), where the corporate fiction has been ignored at the behest of the

corporation itself, are as follows: *Broughton* v. *City of Pensacola*, 93 U. S. 266; *Shapleigh* v. *San Angelo*, 167 U. S. 646; *Alden* v. *Wright*, 175 N. Y. A. D. 692; *Southern Pacific Company* v. *Lowe*, 247 U. S. 330; *First Society of M. E. Church* v. *Brownell*, 5 Hun. 464; *People ex rel. U. S. Grand Lodge* v. *Payn*, 161 N. Y. 229; *People ex rel.* v. *Secretary of State*, 13 N. Y. A. D. 50; *Jones* v. *Frances*, 70 Wash. 676; *McGann* v. *Children's Home Society*, 176 Cal. 359.

It is doubtful whether any case can be found in the books, where the corporate entity has been completely unchanged notwithstanding reincorporation. The issue is therefore clearly raised in this case. We respectfully submit that this Court of final and ultimate jurisdiction should avail itself of the opportunity to establish the law on the subject.

POINT II.

In the interests of unanimity of opinion, a dispute between the Sixth and Second Circuits as to the question presented under Point One should be resolved.

The irreconcilable views expressed by the two circuits, should be resolved by this Court. It is respectfully submitted therefore, that the writ of certiorari prayed for should be granted.

EDWARD G. GRIFFIN,
Attorney for Petitioner,
51 Madison Avenue,
New York City.

JOSEPH STERLING, ESQ.,
of Counsel,
51 Madison Avenue,
New York City.